SUPREME COURT, U. S.

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1961.

No. 77

NATIONAL LABOR RELATIONS BOARD,
Petitioner,

vs.

WALTON MANUFACTURING COMPANY and
LOGANVILLE PANTS COMPANY,
Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT.

BRIEF FOR THE RESPONDENTS

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STATUTE

National Labor Relations Act, as amended (61 Stat. 136, 29 U.S.C. 151 *et seq.*)—

Section 10 (e) 2, 54

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BRIEF FOR THE RESPONDENTS

STATEMENT OF THE CASE

The statement of the case contained in Petitioner's Brief constitutes an elaborate argument of the factual issues. It is Respondents' position that there are many inaccuracies and omissions contained therein. In order to fully point out these inaccuracies and omissions, it would

be necessary to present a complete counter-statement which would be a duplication of the argument on the factual issues. In order to avoid such duplication, the inaccuracies and omissions of the Petitioner's statement of the case are pointed out in the argument[1] (*infra*, p. 5).

SUMMARY OF ARGUMENT

The Court of Appeals properly performed its statutory responsibility under Section 10(e) of the National Labor Relations Act (61 Stat. 136, 29 U.S.C 151, *et seq.*) in this case. In reaching its decision the Court of Appeals expressly recognized the limitations upon its scope of review as well as its responsibility to determine whether the findings of the National Labor Relations Board with respect to questions of fact were supported by substantial evidence on the Record as a whole. The Court stated that it had made a painstaking review of the Record in the case and could only conclude that the findings of fact with regard to the four discharges and the nine layoffs in question were not supported by substantial evidence.

The scope of review of the Courts of Appeal was clarified and strengthened by the 1947 amendments to the Act. This Court has long recognized and effectuated this intent of Congress to impose additional responsibility upon the reviewing court. *Universal Camera Corp.* v. *National Labor Relations Board*, 340 U.S. 474 and *National Labor Relations Board* v. *Pittsburgh Steamship Co.*, 340 U.S. 498.

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1. Petitioner has made repeated reference to the case of *NLRB* v. *Florida Citrus Canners Cooperative*, No. 94, this term. Inasmuch as the Respondents in the two cases are entirely different, the industries involved are dissimilar and the cases involve different sections of the Act, it is respectfully submitted that the two cases should be considered separately.

An examination of the Record in this case reveals that the Court of Appeals did not misapply the law governing its scope of review, either "grossly" or otherwise. The decision of the Board was based upon surmise, conjecture, unsupported inference and false reasoning. The Respondents offered unchallenged evidence to support their decision with regard to each employee laid off or discharged. Naturally, being matters of business judgment, these decisions could not be supported with the uniform application of a precise formula. Each layoff and each discharge must, of necessity, depend upon the circumstances peculiar to it. Thus, an unskilled floor girl was laid off because her job was abolished. A trainee in a particular section was laid off because there were sufficient trained operators in the section. An operator whose job was abolished was laid off in preference to another employee who had a proven ability to learn a new operation at a much greater rate of speed. One of two employees doing the same job was laid off because her production record was considerably poorer than that of the employee retained. Another operator was laid off because her job was to handle the overflow work from two other operators when needed. In the production cutback there was no overflow. One operator was chosen for layoff for the reason that she was performing the least skilled job in her section and therefore lacked the higher skills of the other operators.

Obviously, from the above, it is apparent that there were good, sound business reasons for each layoff. The same was true of the discharge cases. Insofar as the layoffs are concerned there is no issue in the case as to its economic necessity. The only issue was which employees should have been laid off. The General Counsel made no attempt to produce evidence contrary to the reasons advanced by Respondents. The decision of the Trial

Examiner and the Board was to the effect that Respondents chose the wrong employees for layoff. In an attempt to support that conclusion the circumstances of each layoff were applied to the other layoffs. Obviously the circumstances were not the same in each case. However, where there was a factor which was controlling in one case because of the circumstances but was not controlling in another because of the circumstances, then the Board found discrimination in both cases. The Board and the Trial Examiner were completely blind to the obvious, distinguishing circumstances peculiar to each case. In any event, discrimination was found in all instances. Undoubtedly due to the complete lack of evidence to the contrary, this same approach of applying the peculiar circumstances surrounding one decision to an analysis of the other decisions was utilized throughout the Intermediate Report and the Board decision. If, however, the Board's reasoning were actually put into practice in the layoff, the result would be outrageous discrimination against the employees whom Respondents would be forced to terminate. Undoubtedly, if these latter employees had been the ones designated as the "union organizing committee" their layoff would have been vigorously condemned by the Board. In that light, the purpose and effect of the letter are crystal clear. It was an arrogant attempt to secure preferential treatment for the Union adherents in the face of a mass, economically necessary, layoff. In the light of the Board's decision, and reasoning, this bold maneuver was most successful.

The Petitioner's argument that the Fifth Circuit requires a higher standard of proof in a case of this type or that it has formulated special rules for review which are inconsistent with the Act and the governing principles laid down by this Court is completely unfounded. The Court in this very case expressly stated the applicable principles

of law and properly applied them. To reach any other result in this case would be to confine the review powers of the Courts of Appeal to a consideration of the evidence in support of the Board's decision in isolation, in clear derogation of the express intent of the Congress.

ARGUMENT

It has been the contention of the Respondents throughout this case that the evidence permitted of only one result —a complete dismissal of all charges. The Court below reviewed the Record. With the exception of a few isolated incidents, which certainly do not constitute an intensive campaign to defeat a union, the Court of Appeals found that the Board's findings and conclusions were not supported by substantial evidence in the Record considered as a whole.

It is argued by the Petitioner that the Court below has displaced the Board's choice between two fairly conflicting views. An examination of the Record and the Court of Appeals decision reveals that the Board's view was not a fair and reasonable one. It was not supported by the evidence.

I. The Facts

There is a very important factor involved in this case which distinguishes it from the ordinary unfair labor practice case. This factor was injected into the case by the union when it dispatched a letter to the Respondent Walton setting forth a list of purported union advocates and impliedly threatening Labor Board action in the event of their termination. It is of significance that a copy of this letter was sent to the National Labor Relations Board at the same time the original was sent to Respondent Walton (G.C. Ex. 5, R. 472). The Respondents' officials and representatives were not blind to the significance of this letter.

It was an outright threat of litigation in the event the persons listed therein did not retain their jobs. Naturally Respondents' officials recognized this threat. Prior to and at the same time this was occurring Respondents were preparing for a cutback in operations which would result in the layoff of a number of employees. Preparations were being made; decisions had been reached as to which employees would be laid off and which would be retained. When the Union's threat arrived, the Respondents were placed in a dilemma. On the one hand, the Union organizing committee could be retained in full and nonunion personnel laid off, thus avoiding charges from the Union. But this would be a clear violation of the law because the people being laid off would obviously and certainly be the victims of discrimination because of their *failure to participate in union activities*. This is no less a violation of the law than that which Respondents were accused of in the present proceeding. The Respondents had the other alternative of following the plans which had been tentatively arrived at, that is to say, "letting the chips fall where they may" by making a decision as to which people should be retained and which should be laid off upon the basis of merit. A number of the people on the Union's list ended up being laid off. *But the undisputed testimony is that they were destined for layoff before the union letter arrived.* Why were they so destined? Because as individuals they did not measure up to the standards of the employees who were to be retained. Perhaps, this provides some explanation for this unusual move on the part of the Union. Perhaps, the Union suspected that in the event of a layoff these people, who were not as competent and not likely to retain their jobs, would be the ones to go. *And so the issue reduces itself to whether a union may intimidate an employer into preferring the organizing committee over nonunion people through a threat of litigation when a layoff becomes necessary, even though*

the facts show that they do not otherwise deserve the preference (See: *Houston Maritime Assoc., Inc.*, 121 NLRB No. 57).

In this letter the named employees were designated as the "organizing committee". The evidence reveals that not one of the employees took any part in the Union's organizational efforts other than signing a card and attending a meeting or two. All organizing was done by a team of professional organizers sent in from various parts of the country (R. 276, 277).[2] This evidence leaves but one conclusion: *There was no organizing committee* and the resulting letter sent by the Union to the Respondents announcing the existence of such a committee was a devious attempt by the Union to force the Respondents to give preferential treatment to the union advocates in its operations. The decisions of the Trial Examiner and the Board not only validate and give official sanction to this devious scheme but in fact appear to do so with relish and enthusiasm.

To say the least, it is quite apparent that this maneuver on the part of the Union completely diverted the attention of the Trial Examiner and the Board away from a true and impartial evaluation of the facts.

Another important factor which distinguishes this case from the ordinary unfair practice case is the procedure followed by the Trial Examiner and ratified by the Board in determining that *all of the layoffs* were discriminatory. The authority upon which this decision is based is cited by the Trial Examiner as "Uspensky, Introduction to Mathematical Probability (McGraw-Hill 1937), Chapter 1" (R. 153). The Trial Examiner "reasoned" that the probability of the nine union people being chosen for layoff at the time they were chosen was 2,758,590 to one. According

2. R.—"Transcript of Record."

to this "jurist" we can now decide cases by a mathematical formula of probability. Or, to put it in his own words, we may reach decisions on important matters "on the basis of pure chance * * *" (R. 153). It is respectfully submitted that if such is proper the whole system of jurisprudence under which we have operated for centuries had been superseded. There is no longer a requirement that one party carry the burden of proof or that there be evidence. All we need do is refer to Mr. Uspensky for the answer. It is quite obvious that the decision of the Trial Examiner in this case was based precisely upon that system of mathematical probability. He, and the Board, took one look at this case and said you can't lay off the union workers. They gave no more consideration to the relative skills and merits of the various employees than Uspensky's formula did. *These Respondents had the audacity to go through with a planned layoff in the face of the union threat letter and that is all the Trial Examiner and the Board needed.* From that point on it was a matter of "fly specking" the testimony to find ways and means of supporting the desired result. This case was decided on two things; (1) a mathematical formula, and (2) a Labor Board predisposition against any layoff of union committee members. It is respectfully submitted that neither of these bases are proper and that when the Board decision is viewed in this light the petition for enforcement should have been denied.

IN ORDER TO FULLY APPRECIATE THE SIGNIFICANCE OF THIS DOCUMENT, WHICH WAS RECEIVED INTO EVIDENCE AS GENERAL COUNSEL'S EXHIBIT 5, IT MUST BE TAKEN INTO CONSIDERATION THAT THERE IS NO ISSUE IN THE CASE AS TO WHETHER A LAYOFF WAS NECESSARY AT THIS TIME. IT WAS CONCEDED BY THE GENERAL COUNSEL THAT THE LAYOFF WHICH WAS EFFEC-

TUATED ON JANUARY 31 WAS NECESSARY FROM AN ECONOMIC AND BUSINESS STANDPOINT. THERE IS NO ISSUE IN THIS CASE OVER WHETHER THE RESPONDENTS DID IN FACT CUT BACK THEIR WORK FORCE AND CONTINUE THE CURTAILED OPERATIONS UP TO THE TIME OF THE TRIAL.

A large number of employees were laid off on January 31, 1958. Names of eight of these appear on General Counsel's Exhibit 5. Another employee on that list, Leila Beaver, was likewise laid off on January 31, from Loganville Pants Company along with many others. Three of the employees on the list, Mary Lou Partain, Jeanette Beavers and Lucy Brooks were not laid off at all.

The Record is rather replete with explanations of why the alleged discriminatees were laid off as opposed to others. These explanations were furnished by the Respondents. *The Record is silent with respect to any evidence concerning discrimination for union reasons against these people with the sole exception of General Counsel's Exhibit 5.*

Before going into the details of each case, a few words about the Respondents' presentation. In the case of each one of these layoffs, the supervisor involved, the superintendent, and Morris Scharff were interrogated concerning the reasons. This is everyone connected with management who had any information concerning the reasons for these layoffs. The same is true of all the other facts in this case. The Respondents brought forth voluntarily every person within their power who had any remote connection with the issues and interrogated them and subjected them to cross-examination. In addition, Respondents revealed production figures, employee figures, texts of speeches and other information voluntarily and all in the interest of truth. Respondents did this because the facts are there.

Respondents did this because they had nothing to hide. They did this with the full knowledge that several witnesses testifying as to the same subject are not likely to relate precisely the same details. It would be a strange presentation if they did. It would be an unbelievable case if there were no minor inconsistencies in the testimony of the various witnesses. Yet, the Trial Examiner used the device of pointing to minor inconsistencies in the testimony to justify his predetermined conclusions. His Intermediate Report is a better brief in support of Petitioner's case than the one they filed. On the other hand, the basic facts, which will be hereinafter discussed, run throughout the testimony. They establish without question that these employers made an attempt to comply with the law in every respect, *including a refusal to discriminate against those whose cause was not being pleaded by the Union.* These are companies which made their choice of complying with the law even if it meant additional expense and trouble. And now, because the red flak which was introduced into evidence as General Counsel's Exhibit 5, has blinded the Trial Examiner and the Board into ruling against the Respondents on every single discharge or layoff alleged, these Respondents are paying the price for not acquiescing in the coercive tactics of the Union. If the layoffs of January 31 are unfair labor practices then another amendment will have been written to the National Labor Relations Act. In the unlikely event this case reaches such a result, the effect of it will be to require employers to give preferential treatment, not nondiscriminatory but preferential treatment, to the union leaders over the other employees, union and nonunion. This is the real issue in this case.

The indirect bearing of the Union's threatening letter upon all the issues in the case cannot be overlooked. It

is the backbone of the Trial Examiner's and the Board's decisions. *Remove this self-serving document, this record-building maneuver, this litigation-minded trick, from the evidence and the Board's case falls flat on its face.* The letter served its purpose of blinding the Trial Examiner and the Board and of covering all the gaping holes in their case.

When the Record was reviewed in its entirety by the Court of Appeals, the findings of the Trial Examiner and the Board were found to be completely out of proportion to the facts, erroneous and without just cause. *The Trial Examiner credited Respondents' witnesses only to the extent they corroborated General Counsel's witnesses and otherwise discredited them completely.* Where as here, the Record reveals the credibility findings to be so antagonistic to the actual evidence in the Record, much of it uncontested and unquestioned, then these findings establish clearly the bias and prejudice of the Trial Examiner, absolutely removing any possibility of Respondents receiving a fair and impartial adjudication by him. The Court of Appeals took cognizance of this.

An examination of the Record as a whole, the Trial Examiner's rulings and remarks contained therein and the overall tenor of the Intermediate Report with its flair for advocacy as opposed to judicial determination clearly establish the bias and prejudice of the Examiner. There is no reasoning. There is no attempt to reconcile conflicts and logically arrive at facts and truth. In many instances there is no reference to the facts except in broad generalities and unsupported conclusions. Frequently, findings and conclusions are supported only by wholly unrelated findings and conclusions as to other matters. If a record is lengthy, complicated, controversial and technical, it does not justify taking the

expediency of reliance entirely upon credibility findings. It is an old game to fall back upon "credibility" when issues are difficult of resolution against a party. But does this justify brushing over obvious facts, uncontested evidence, gaping holes in the General Counsel's case? The General Counsel's case must rest upon facts, it cannot be supported by mere findings of credibility, as unrealistic as they may be. Likewise, credibility of witnesses cannot under any circumstances alter the facts. *This is a case where the Trial Examiner obviously became so completely overwhelmed by his determination to resolve all issues of credibility against the Respondents that he completely failed to perform his statutory duty of ascertaining the true facts by analyzing the evidence.* As one reads the Intermediate Report, it becomes increasingly obvious that the author thereof became more and more impressed with his own cute remarks about Respondents' witnesses and less and less concerned about the facts of the case. This evolution of misguided "logic" is finally climaxed by several conclusions on important issues against Respondents, of course, simply on the basis that everything else had been decided in favor of the General Counsel. This is not only erroneous analysis but it does serious harm to the judicial process under which the Trial Examiner operates. The Board in obvious routine fashion ratified the Intermediate Report with minor changes. For the first time, when the case reached the Court of Appeals, a fair and impartial analysis of the facts was made. The only fair conclusion which could be reached was that the evidence did not support the allegations of the complaint.

An examination of the credibility findings of the Trial Examiner reveals that they are supported by very minor inconsistencies, which inconsistencies are wholly in keeping with the extensiveness of the issues and the

normal lack of training in rhetoric and legal terminology of the witnesses. A reading of the testimony of the General Counsel's witnesses, which is not nearly so extensive per witness and which does not require relation of detailed facts on a multiplicity of subjects as does that of Respondents' witnesses, shows inconsistencies of far greater magnitude. For obvious reasons the Trial Examiner neglected to mention these inconsistencies. Likewise, he neglected to mention that the General Counsel's witnesses remained in the courtroom throughout the trial thus having the benefit of one another's testimony.

The Record clearly shows that after the Respondents became aware of the Union's organizational drive, the supervisors did not in any way interrogate or interfere with the employees concerning the Union (R. 335, 520-521, 525, 562, 564, 568-569). It is further disclosed by the Record that the only knowledge the Respondents had of the Union adherence of the employees laid off on January 31, 1953, was the letter received from the Union announcing that these employees were for the Union (G. C. Ex. 5, R. 472).

In support of its position, the Petitioner argues in its Brief that Respondents waged an intensive campaign designed to defeat the Union's efforts at organizing the employees. This argument resembles the Trial Examiner's approach to the facts of the case. A few isolated incidents are combined with several perfectly legal occurrences to form the basis of a broad general conclusion of a widespread, illegal attack upon the Union. This broad general conclusion then forms the basis for finding that all conduct involved in the case is illegal.

In his Report, the Trial Examiner stated:

"The Complaint does not allege the announcement of the additional benefits, to defeat the Union's or-

ganizational efforts, as a violation of the Act, and I therefore will make no findings based thereon." (R. 65).

However, in his conclusions he lists as one of his findings of illegal conduct:

> "(1) A letter to their employees outlining new benefits, paid vacations and holidays which employees could enjoy without paying 'dues or initiation fees to any outside union' " (R. 151).

This obvious inconsistency on the part of the Trial Examiner is characteristic of the defective "reasoning" upon which his decision is based. The Petitioner likewise relies upon these facts in its argument (P. B. p. 3).

The Record reveals that the Respondents in the exercise of the right of free speech sought to inform the employees of their rights as guaranteed under Section 7 of the Act. This was done in the form of speeches made by Morris Scharff to all employees (Resp. Ex. 89, 90). The General Counsel's well-coached witnesses varied as to the true context of these speeches, and the Trial Examiner so found (R. 69-70). (*It is significant that these obvious inconsistencies and vague accounts were not considered in determining their credibility.*) The Respondents in an effort to clarify this incorrect testimony of the General Counsel's witnesses made available as exhibits, copies of the speeches to the Trial Examiner (Resp. Ex. 89, 90). It cannot be said that these speeches contain anything other than what management may do under the rights of free speech as set forth in Section 8(c) of the Act. The Trial Examiner and the Board so found with the exception of one portion of the speech (R. 71). The finding in this latter respect is wholly unfounded and the Court of Appeals so ruled (R. 723). It cannot be assumed that such a state-

ment made by a person, who is admitted to be acting only in an advisory position, can reasonably be interpreted as the equivalent of a threat to shut down the plant rather than deal with the Union as found by the Trial Examiner (R. 72). It is clear that the Respondents advised the employees otherwise (R. 66, 82, 545, 561). The witnesses of the General Counsel clearly demonstrated that no such threat was conveyed to them. This conclusion by the Trial Examiner and the Board is not supported by the evidence and is too remote to bring it within the realm of probability. It is simply another example of the zealous way in which this Trial Examiner set about to crucify these Respondents. The Court of Appeals recognized this and refused to go along.

The evidence further reveals that the conversations between Morris Scharff and employees were made without any threat of reprisal or promise of benefit (R. 66, 520, 545).

While the Respondents have contended throughout that the conclusions that Supervisors Higgins and Ewing threatened employees were not well founded, even if they did occur they obviously were isolated, unimportant incidents. The findings were that Higgins stated to one of the alleged discriminatees "that they (the Scharffs) would close their plant down before they would work union labor" (R. 76). The Record clearly shows that the employees were expressly informed otherwise (R. 66, 82, 545, 561). The finding as to Ewing was that she stated to another alleged discriminatee, Pauline McGee: "If you don't want to dig your own grave, you better shut up talking about the union." (R. 77). The Record is replete with testimony that Respondents' supervisory personnel engaged in no anti-union campaign (R. 335-336, 521, 525, 552, 561-562, 564, 568).

The evidence further shows that Superintendent Hughley, who was in charge of the entire Loganville Pants Company operation, did not in any way interrogate or otherwise interfere with the rights of the employees under his jurisdiction. Despite the absence of any union animus on the part of Hughley (R. 565), the Trial Examiner nonetheless found that Hughley had promulgated a rule against union talk in the plant (R. 80). Even the Board couldn't bring itself to adopt this illogical, absurd conclusion.

It is to be noted that the General Counsel in its attempt to convict the Respondents of violating Section 8(a)-(1) of the Act alleged other incidents of interference, restraint and coercion. These other allegations were completely without merit and were so found by the Trial Examiner (R. 80-81).

It is submitted that any conduct on the part of the Respondent which might in and of itself be construed as a violation of Section 8(a)(1) of the Act, when viewed in the entirety of the proceedings, are of such an isolated nature as to not constitute a violation of the Act. It is further submitted that any and all conversations between management personnel and employees, in which management spoke, were made in the exercise of rights guaranteed under Section 8(c) of the Act.

The entire Record plainly shows that once the Respondents became aware of the Union's organizational drive, an effort was made to point out and guarantee the rights of the employees under Section 7 of the Act. Almost all of the General Counsel's witnesses testified of no interrogation as to union interests by any of the supervisors (R. 336, 520, 521, 525, 552, 561-562, 568, 569). Yet, the Intermediate Report and the Record plainly show the Trial Examiner picked out various isolated incidents of a highly ambiguous na-

ture and read into them elements in the nature of threats and other coercive conduct.

The Layoff of January 31, 1958

The Respondents in this case commenced business in the Summer of 1957. They were newly chartered corporations entering into the garment business for the first time in Loganville, Georgia. Respondent Walton Manufacturing Company, the principal corporation here, is in the business of manufacturing and selling men's dress suits. Respondent Loganville Pants Company was engaged in the manufacture of the pants for men's dress suits, with Walton Manufacturing Company as its sole customer. Loganville Pants Company ceased operations on or about January 31, 1958, and has not operated since that time (R. 588).

The Record in this case shows that Respondents started their operations with completely inexperienced workers. The management of the companies was highly skilled and very experienced, having been in the field for many, many years. It was necessary for the Respondents to train the green, inexperienced personnel who started to work in the Summer of 1957. Naturally, inefficiency and low production were to be expected during this period of training. Likewise, it was necessary to employ more workers to meet production requirements in the early months than would be expected to do the same work as skills were acquired and efficiency increased.

The garment business is seasonal in nature and this results in fluctuations from time to time in the work force. Temporary seasonal lags may be bridged by reduced hours. More prolonged drops bring about layoffs (R. 672-674).

So it was in the late Fall of 1957, a combination of increased efficiency in production and curtailed production

requirements combined to make necessary a sizeable reduction in Respondents' work force. *It is important to note again here that the necessity or the legitimacy of the layoff on January 31, 1958, is not in issue* (R. 113). The only issue with regard to the layoff involves the question of which employees should have been laid off and which retained.

The Trial Examiner made a detailed analysis of each individual choice involving alleged discriminatees and determined that each and every choice was erroneous and discriminatory in nature. His "reasoning" during the course of this analysis is so inconsistent and illogical at times that it almost surpasses the imagination. For example, Respondents' witnesses testified that four factors were considered in determining which employees were to be laid off. With clock-like precision the Trial Examiner took those factors and whichever one did not fit in each particular case he used it as a reason for discrediting the Respondents' witnesses without any regard for the peculiar circumstances involved. If Respondents' witnesses said seniority was a controlling factor, then the Trial Examiner would brush that fact aside and concentrate his fire on some other factor. If on the other hand another employee under consideration had seniority in her favor and the Employer did not give that controlling consideration, then that provided a basis for finding a violation. A few days seniority held great significance in one case but three weeks was of no consequence in another. If an employee had been reprimanded or warned that was inconsequential. Conversely, if the Record did not show a reprimand then that was a controlling factor. If the Respondents offered a comparison which could not be overlooked or explained away (which with this Trial Examiner was a practical impossibility), then the important factor was that Respondents neglected to produce additional comparisons. On the other hand, in

the case of one non-production employee the controlling factor in the Trial Examiner's mind was that Respondents failed to show a comparison with anyone else—although the Record showed that her job was different from any others and was abolished. Obviously, the choice of employees for layoff must include some intangible, subjective considerations. Certainly, when the decision is participated in by two, three or more individuals they would not be expected to use the same descriptive terms to explain the choice. It is unreasonable to expect each one of them to be able to list each and every factor leading to each and every decision. Yet, in this case each time there was the slightest variation in terminology between Respondents' witnesses it became a giant inconsistency. Each time one witness listed a reason for a choice which another witness might have overlooked it became a deliberate fabrication. Thus, we are told that one witness' testimony that one employee's quality was "a little better" than another's is inconsistent with another witness' testimony that the same employee had "a greater potential and was a better operator." (R. 132). If the Respondents' supervisors told an employee she was doing better or gave any word of encouragement then that was evidence that the employee was discriminated against in the layoff. If there was no evidence of words of friendly encouragement then the absence of reprimands was important.

In a case of this kind, with as many hundreds of pages of testimony as this, it is absolutely fantastic to believe that not one single witness for Respondents uttered one single word of truth, except where something was useful against Respondents. It is incomprehensible to find that every last issue of credibility was resolved in favor of the General Counsel's witnesses and against the Respondents.

The Trial Examiner finds and Petitioner argues in its Brief that sixteen employees were laid off on January 31, 1958. The Record indicates that there were at least twenty laid off by Walton Manufacturing Company that day and at the same time Loganville's entire operation was suspended (R. 588). The effect of the ruling which the Board seeks to enforce is to hold, without equivocation, that not one single member of the organizing committee should have been laid off in a major cutback in the work force. Therein lies the fallacy in the Board's case. They got so carried away with making an example of this Employer that they forgot about evidence; they forgot about logic; they apparently forgot about the review powers of the Courts.

The burden of proof in this case lies with the General Counsel. It is up to him to prove that each one of these layoffs was discriminatory. An examination of the Record as a whole indicates that the General Counsel completely failed to carry that burden. The Trial Examiner's analysis of the layoff deals almost entirely with his attempt to tear down and discredit Respondents' case. Even if he had been able to do this, the stark reality remains that the General Counsel's case consisted entirely of the fact that these people were named in the letter as members of a fictitious organizing committee. It is respectfully submitted that this does not prove discrimination according to legal requirements. Moreover, the substitution of the inexpert opinion of the Trial Examiner and the Board in lieu of the direct, expert testimony of the Respondents' witnesses, does not provide a basis for a finding of discrimination. The Trial Examiner had applied a test of absolute precision to the layoff decisions. Such decisions, involving the relative merits of people, can never be absolute. Obviously, there are no black and whites in such problems but merely shades of grey. The consideration is not whether an em-

ployee's quality of work was so unacceptable that she should be discharged, as the Trial Examiner seemed to require. The proper consideration is whether her quality is lower than an employee who is to be retained. A layoff calls for a completely different set of considerations from a discharge. This simple fact seemed to escape the Trial Examiner and the Board completely.

The Petitioner's Brief likewise fails to take into account the vast distinction between the considerations which must apply in a layoff situation as opposed to a discharge. On this very point the argument that the Court displaced the Board's choice between two fairly conflicting views fails completely. In considering the layoff decisions the Trial Examiner and the Board potently refused to see the facts. In every case the facts support the choice made by the Respondents. It would be indefensible to lay off an operator from her regular job in lieu of another operator whose production record was poorer and who simply handled overflow work. Yet this is what the Board held in the case of Nellie Hood (see *infra*, p. 25). It likewise would have been inexplicable if the Respondents had given Nellie Hood, an unskilled floor girl who carried bundles to the operators, a job in which she had had no training or experience (see *infra*, pp. 25-26). Frances Elizabeth Johnson was a *trainee* in a five-girl section. The Board ruled that because she had been given words of encouragement and a recent raise, she should have been retained over experienced operators who had been doing the job for months. In each case, the Examiner and the Board found some circumstance, some factor which they relied upon to dispel the Respondents' logical explanations of the layoff decisions. But if the circumstances were reversed no fair-minded person could say that these factors were sufficient to support a decision to lay off the other employee or em-

ployees. The Record simply does not support the Petitioner's argument that there were two fairly conflicting views. A detailed comparison between the largely uncontested facts which support Respondents' position as to each layoff and the largely insignificant circumstances relied upon by the Petitioner to support its position establishes beyond question that the conclusions reached by the Trial Examiner and the Board clearly are not supported by substantial evidence. Therein lies the basic fallacy of the Petitioner's position before this Honorable Court.

LAYOFF OF LELA BEAVER.

The layoff of Lela Beaver is a perfect example of the Trial Examiner's approach to this whole thing. Quite a number of employees at the Loganville Pants Company were laid off on January 31. The remainder of the work force was transferred to the Walton Manufacturing Company. Lela Beaver was one of those who was laid off. *She was the only one of a large group in the Loganville group laid off on January 31, whose name was mentioned in the Union's letter. She is the only one laid off on January 31, from Loganville Pants Company named in the Complaint. There is no other evidence in the Record which would support a finding of discrimination in the case of this layoff.*

In an effort to overcome this obvious weakness, the Petitioner adverts to a statement which Loganville's manager, Mr. Hughley, allegedly made in response to Beaver's accusation that her layoff was due to union activities. It should be noted that this statement itself was alleged to be a violation of Section 3(a)(1) in the Complaint. The Trial Examiner sustained the allegation but the Board reversed him. Now the Petitioner seeks to rely upon it in support of its position as to Beaver's layoff. On the other hand,

the Respondents have related the reasons Lela Beaver was not transferred to the Walton plant at the time of the layoff. As in the case of any layoff, questions can be raised, comparisons can be drawn. There is no evidence, however, which would even hint that the factors which were presented were not valid and did not provide the basis for the decision. The reason Lela Beaver was laid off was that in reducing the work force it was necessary to consolidate the operation which she was doing with another job. It was considered that Lela Beaver would be slow in learning the other operation, *slower than the other girl*, Alice Lowe, and therefore Alice Lowe was retained to do her work and Lela Beaver's.

The Record here is unquestioned that Beaver was unusually slow in learning and therefore a girl who was faster in learning was put on the combined jobs. The Trial Examiner and the Board rejected this unchallenged explanation for Lela Beaver's layoff. The question is whether this Employer must retain an employee for a new job who is admitedly slower in learning than another girl who is available (R. 432, 645-646, 683).

It is significant to note here the Trial Examiner's analysis of this layoff. He rejected the testimony of Beaver's former supervisor, Atha, who had absolutely no interest in the outcome of the case since she was no longer employed by Walton (R. 117). He *assumed* that Beaver's continuous make-up pay was due to the unavailability of work when the only conceivable basis for the assumption was Beaver's testimony that Hughley had made an off-hand remark to her that she could make production if they had the work. Beaver's testimony does not show an expression from her that this was the reason. This certainly doesn't prove the fact and even if it did it wouldn't support the Trial Examiner's findings since the basis of the layoff was her in-

ability to learn a new operation. Then the Trial Examiner attempted tc take advantage of a letter which was written by Morris Scharff to Counsel for Respondents in which he indicated that he wasn't sure of the basis for the layoff but assumed it was for poor work. This letter was admitted over objection of Respondents and Respondents contend that it should have been rejected. However, a reasonable reading of the letter clearly shows that Scharff qualified his remarks because he was writing from memory without the benefit of a thorough investigation into the matter.

The Trial Examiner made a big point of how many operations Beaver was capable of doing. Here again he attempted to inject a basic factor—versatility—which did not figure into the layoff. Inability to learn a new job was the basis. But the Record does not support his finding that Beaver performed two operations while the employee retained performed only one. Beaver's job was setting flies and turning corners. This obviously was one operation which most witnesses referred to as setting flies. Alice Lowe's job was sewing on belt loops. There is absolutely no evidence that one of these jobs is easier than the other and yet the Trial Examiner, who certainly revealed no expertise in the garment field, *assumed* that Beaver's job was more difficult. Here again he is injecting a factor, *based entirely upon assumption*, which did not figure in the layoff. It is interesting to note that the Trial Examiner himself referred to Beaver's job as "the operation of setting flies and turning corners." (R. 116). In conclusion, the Trial Examiner said that Beaver was equal to Lowe in quality, production and versatility—only one of which is supported by the Record—and therefore seniority (approximately seven weeks) should prevail. Typical Labor Board fashion, a criterion is adopted and applied in

robot fashion and if everything doesn't fit then it's wrong. The Trial Examiner and the Board refused to see the reality of the situation. It is fine to attempt to follow criteria where possible. But, here there was another compelling factor—her inability to learn a new job within a reasonable training period—which no one denied and the Respondents have a right to follow it. The Record simply does not support the Board's finding as to Lela Beaver.

LAYOFF OF NELLIE HOOD

Nellie Hood was a floor girl. She delivered materials to the various operators and did odd jobs. Her job was abolished as a result of the layoff and the work which she was doing was absorbed by various other employees who were regularly engaged in more productive and more highly skilled operations. The supervisor even did a portion of it. This was a sort of luxury job which could be and now is being done by the other workers. This is a logical place for a cutback when the work force is being reduced (R. 320, 428-429, 467, 516, 637, 658-659, 692-693).

The Record clearly shows no illegal conduct was committed by the Respondents with respect to this employee. The isolated statement of Supervisor Carter had no threat in it and which fact was admitted by Nellie Hood (R. 554).

The Trial Examiner's findings regarding Nellie Hood are unbelievably fantastic. About all he has found to say is that Respondents failed to come up with a comparison between her and some other employee and he discovered an inspector who had less seniority who should have been explained away. Hood was not a production employee. She matched up bundles of cloth and hand carried them to the machine operators. She had no production quota; in fact, she produced nothing. *She performed an un-*

skilled job which Respondents could do without in a cutback and so it was eliminated. Her job was eliminated, therefore, she was laid off. It was a position layoff. This seems simple enough but the Trial Examiner insists that it be justified on a seniority basis with someone doing an entirely different, unrelated job who obviously was already trained where Hood was not. The burden of proof is upon the General Counsel. It is respectfully submitted that there is no evidence in the Record to support the Trial Examiner's and the Board's findings as to Nellie Hood.

LAYOFF OF FRANCES ELIZABETH JOHNSON.

There were five operators in the lining section, Frances Elizabeth Johnson, Mary Barnes, Annie Brooks, Imogene Meeks and Odele Barnes. Mary Lou Partain also spent part of her time in the lining section. At the time of the layoff, two of the operators in this section were eliminated, Mary Barnes and Frances Elizabeth Johnson. Frances Elizabeth Johnson had only been in the lining section for six weeks, and certainly in the cutback, she should be laid off before the others. The other girls were more skilled in the operation and more valuable to the Company. The work which she had been doing was absorbed by Odele Barnes and Imogene Meeks, two highly skilled, competent operators. *Now Mary Barnes was also laid off, but, unfortunately for her, her name did not appear on the Union's threat letter.* This is not to say that Frances Elizabeth Johnson was an undesirable employee. Because of her limited experience and skill, she was simply less valuable than others in the section. Those are the people you eliminate when you cut your work force (R. 319-320, 417-419, 441-442, 446-447, 467, 515-516, 625, 657-658, 692-693).

The factors which were given weight by the Trial Examiner, and which Petitioner would have this Court fol-

low with respect to this employee, were that she was given a raise a few weeks before her layoff and had been complimented by the plant superintendent (R. 135). The Record clearly shows that Johnson was given the raise when she was put on the new job in the lining section as an incentive to work hard and develop her talents. *She was on a training program at the time of the layoff.* She was the fifth employee in a five girl section. The result which Petitioner seeks would have the Respondents lay off a trained employee in preference to a trainee

The analysis of Johnson shows that the Trial Examiner and the Board here confused grounds for layoff with grounds for discharge. There is no inconsistency in the testimony. All the witnesses testified that Johnson's work was not satisfactory, her quantity and quality were below par. But, she was in training. However, when it came time to lay off it would be ridiculous to retain a trainee and lay off an experienced operator. Nothing said by the Trial Examiner or the Board in any way overcomes the fact that Johnson was the obvious choice for lay off in the section where she worked.

LAYOFF OF IDA HARPER.

Ida Harper was hired in July, 1957, and performed the job duties of hemming the lining of the coat (R. 361-362). *Harper admitted having a substantial amount of repair work* (R. 537-538), *trouble with the machine she operated* (R. 538), *and makeup pay every week she worked for the Respondents* (R. 538-539), *which resulted from her failure to meet production requirements* (R. 539).

Harper further admits that no supervisor or anyone else connected with management ever spoke to her about unions (R. 540-541). In addition to the above, *Ida Harper*

admitted talking and laughing and generally staying away from her work (R. 369, 541), *and being absent a great deal* (R. 410-411, 543, 592-593).

Ida Harper was laid off January 31, 1959 (R. 366-367). The Record is clear that this alleged employee was laid off for being an unsatisfactory operator, for general "horse-play" and because her job was only part time (R. 408, 439, 440, 591-592, 691-692).

The Record contains no evidence of discrimination to Ida Harper or a discriminatory motive in her layoff.

The Trial Examiner's analysis of Ida Harper's layoff is completely illogical. He finds that Proterman's testimony that she could not produce properly and that her make-up record was bad is inconsistent with Scharff's testimony that her work was unsatisfactory as to quality and quantity and both are inconsistent with Ewing's testimony that she was terminated for bad work. A great point was made of Ewing classifying Harper's termination as a discharge instead of a layoff—certainly a distinction which would not hold great significance outside legal circles. It almost gave the Trial Examiner apoplexy when she did explain that she didn't know whether the termination was classified a discharge or a layoff. Here again the Trial Examiner applied the test for a discharge in a layoff situation. The Petitioner would have this Court do the same. The Trial Examiner twisted evidence, took testimony out of context, added assumption and conjecture, and threw out testimony as unbelievable where it interfered with his objectives. In effect the Trial Examiner, here as in the other layoff cases, substituted his own judgment for that of Respondents' management personnel, who had years of experience in this field.

LAYOFF OF NELLIE WOOD.

Nellie Wood was hired August 5, 1957, to perform the duties of edge basting and taping fronts (R. 370). This employee admits she did not have a regular job and that she handled overflow work (R. 545). This employee testified she signed a Union card and attended Union meetings (R. 372), and that she received a ten cent wage increase after she had complained about being switched around and had refused to run a machine. This witness further admitted requesting a transfer to the pants plant, because *there wasn't enough work for her at the coat factory* (R. 545). Wood also testified Morris Scharff stated to the employees that he had no intention of closing the plant (R. 545). It is significant that this General Counsel witness admitted that the Union people told her that if she signed the paper authorizing the use of her name in the Union letter, she couldn't be fired (R. 546). This is obvious proof of the Union scheme to gain preferential treatment for its adherents in the Respondent's operations. The bias and prejudice of the Trial Examiner is illustrated by his gratuitous addition to her testimony of the statement that the Union assurance was "presumably for her Union activity." (R. 285). If that had been true it would certainly seem that someone would have seen fit to put it in the form of evidence.

The case of Nellie Wood is one of the more ridiculous. She was a "second stringer" who helped one operator or another when there was an overflow of work. Obviously, if she had been better than they, common sense would have dictated that she already be assigned to one of the regular jobs. *But the Record is absolutely unquestioned that her work did not measure up to that of the other operators.* The Trial Examiner in his zeal completely misstated the evidence on this point. He said Prosterman testified that

Wood *could* do the work as well as the other operators (R. 122). Actually Prosterman's testimony shows that under extensive cross-examination by the Trial Examiner he repeatedly said that Wood's work was inferior and finally speculated that she *might* have approached them if put on one of the jobs (R. 455-456). But still the fact remains that she wasn't then doing as well. Here again there is a misconstruction of the facts. Scharff testified that Wood's work was below par but not sufficiently so as to bring about her termination. In other words, you wouldn't fire her for it—but in a layoff it is a controlling factor. *The fact also remains that the other two employees had seniority over Wood.* After making so much "to do" over seniority in the other cases it is breathtaking to find it brushed aside here. The logic of the entire Intermediate Report and Board decision is laid bare here. The Trial Examiner was so blindly determined to find against these Respondents that he absolutely became irrational. In the case of Nellie Wood he is suggesting that a less competent employee, with less seniority, be retained over more competent senior employees. The melodramatic reference to Mrs. Wood's demeanor on the stand brings to the surface the uncontrolled emotionalism which underlies the entire Intermediate Report. It might just as easily be said that Mrs. Wood was upset because of being forced to testify against her sincere wishes or she might just have been frightened by the Trial Examiner and his rapid-fire verbal exchanges with counsel and witnesses.

The Record does not support the findings as to Nellie Wood. It is obvious that she, herself, did not consider that she had been discriminated against.

LAYOFF OF EVELYN HUDSON.

Evelyn Hudson was employed in the sleevemaking section performing an operation known as sleeve tacking. Also in that section were employees Regina Hall, who was making the seam and vent; Grace Barnes, who sewed the sleeve and the lining together; and Bonnie Thompson, who closed the end seams. *The job which Evelyn Hudson was doing was the most mechanical (requiring the least skill) in this section, and the other operators had more ability and were performing more complicated work* (R. 442-443). It was therefore determined that Evelyn Hudson should be the one eliminated from that section, her job abolished and the work absorbed by the other operators along with their own (R. 321-322, 442, 443, 468, 516, 625-626).

The Trial Examiner put great weight upon the testimony of this Evelyn Hudson. Yet, an examination of the record shows that her testimony was contradictory, inconsistent and vague. She did not have a good memory (R. 397), and yet she vividly quoted untruthful remarks made to her by Morris Scharff concerning the Union letter (R. 398). Later on she admitted that she didn't recall the exact words used (R. 575). This witness testified that she could not do the job of fellow employee Regina Hall (R. 573), and admitted that before and after being recalled, she could not perform the duties of making sleeves (R. 573-574, 576). Hudson also admitted that she failed to make production for her former employer and that she was fired for this reason (R. 575-576). The evidence further reveals this employee had considerable makeup pay (R. 577) and after being recalled was discharged on August 18, 1958, because she was unable to perform the duties assigned to her.

The Trial Examiner in his analysis of Evelyn Hudson's layoff again fell back on the standard doctrinaire approach. He decided that seniority and versatility favored Hudson over the other employees who were retained. He discredited unchallenged testimony that her work was not on a par with that of the others and that she was less skilled. In other words he applied the criteria and finding one to suit his purpose he used it as the basis of his finding of discrimination. He is in effect insisting that every consideration employed in each case be likewise applied to all other cases. The law is not that prohibitive. A realistic analysis of the rigid, austere standards applied by the Trial Examiner reveals them to be unbelievably harsh and unfair. Decisions involving the choice of one individual over another simply cannot be made to fit into a rigid formula (mathematical or otherwise). Respondents have repeatedly attempted to point out this fact but neither the Trial Examiner nor the Board even considered it. They simply tore into the Respondents' explanations with a vengeance and a vigor which only the most ardent advocate could duplicate. The resulting decision reflects for all to see the wisdom of the provisions for Court review which Congress wrote into the Act. One man, the Trial Examiner, got it into his head that these Respondents had violated the Act and from that point on it was not a matter of judicial determination through the processes of reasoning and logic. From that point on it was a question of how he could best tear down, explain away, discredit, destroy, belittle, twist, miscontrue and avoid Respondents' testimony and arguments. But, when it is all over the General Counsel has still failed to carry the burden of proof and there is no substantial evidence in the record to support the Board's decision. The Court of Appeals through the tedious process of examining the Record as a whole reached this inescapable conclusion.

LAYOFF OF BONNIE HAMILTON.

Bonnie Hamilton set welts. She was laid off on January 31. Mrs. Hamilton and another employee, Lucille Yancey,[3] both performed the same operation. Under the cut-back in production, it was only necessary to have one employee on this job, and Lucille Yancey was considered a better operator. This is not to say that Bonnie Hamilton was an unsatisfactory employee. Certainly, no issue has been raised by the Respondents in this respect. But, that does not throw light upon the layoff since Lucille Yancey was not an unsatisfactory employee either. In the case of a layoff, unfortunately, employees who may have proven themselves satisfactory must be laid off because there are not enough jobs to go around. The question in this instance, as in all other layoff situations, was which employees would be more valuable to the company under a cut-back in operations. It was determined that Lucille Yancey was more valuable and therefore she was retained and Bonnie Hamilton was laid off. There is nothing in the Record to challenge the wisdom of this decision. Even if there were, there is nothing to support a finding of discrimination (R. 310-311, 426-427, 637, 653-654).

The Trial Examiner really had to stretch to make a finding of discrimination in the layoff of Bonnie Hamilton. In this case she and the other Yancey both performed the same job. Yancey's production record is substantially better than Hamilton's. Even a person who knows nothing about the garment industry would readily see the wisdom of this choice. About all the Examiner has really said is that he doesn't want to believe it. He points to an "inconsistency" which arises by one witness saying under oath

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3. This is not the Lucille Yancey whose discharge is involved in this case.

that Yancey's work was a "little better" and another saying in a letter to his counsel that it was "much better". Then he says that a third witness characterization of Yancey as having "greater *potential*" is inconsistent with both of the foregoing. On top of that he credits and relies upon the testimony of an unskilled, unqualified floor worker (over the directly opposite testimony of at least three experts) to the effect that Yancey's work was not superior to Hamilton's. Then he adds as an additional controlling factor that Respondent failed to compare Hamilton with other employees, *without naming those others* or giving reason for such a comparison, and of course the fact that Hamilton had a "few days" seniority over Yancey was a matter of utmost importance in convincing the Examiner that the discharge was discriminatory. It is respectfully submitted that not one single point relied upon by the Examiner to find discrimination against Hamilton was valid and there is absolutely no evidence to support same.

LAYOFF OF PAULINE McGHEE.

Pauline McGhee was also laid off on January 31. An employee by the name of Charlotte Findley was retained in preference to Pauline McGhee because it was considered that she had a greater potential and would thus be a more valuable employee. Pauline McGhee basted bottom seams. Charlotte Findley basted bottom lining. These jobs were very similar in nature and under the cutback in operations only one operator was required to do both jobs (R. 311-312, 436-438, 512, 654, 664, 690-691).

The Trial Examiner found this layoff to be discriminatory for several interesting reasons. First he acknowledges that Charlotte Findley had more seniority than Pauline McGhee (although he is quick to point out that it is only a matter of three weeks). Where seniority was an im-

portant factor when it favored the employee laid off, and where three weeks was a significant period in one case and even a "few days" was considered important, now seniority not only is unimportant but he refuses to believe that this was considered in the layoff. Then he refuses to believe, without any supporting evidence to contradict the expert testimony, that Charlotte Findley had more potential or would prove to be a more valuable employee than McGhee. The Examiner deliberately misinterpreted the testimony of Prosterman that Findley earned more money than McGhee. An examination of the Record clearly reveals that in the garment trade one employee "earns more money" when she produces more pieces per hour. Earnings per hour are always the important factor in a piece rate operation such as this. The gross pay argument advanced by the Trial Examiner is merely a subterfuge. Even so, it is misleading even if gross pay were the proper test. The difference in the hours worked and particularly in the overtime and makeup pay are matters which cannot be overlooked.

The records show that Findley had less makeup pay (which is the difference between that earned and the legal minimum of $1.00 per hour) than McGhee throughout the entire history of their employment. The record also shows that Findley had no more makeup after the first week in December, 1957, while McGhee continued to have makeup for at least an additional month.

Finally the Examiner stated his real, and only, reason for finding that Pauline McGhee was discriminately laid off when he relied upon his "general lack of faith in the credibility of Prosterman, Myrtle Ewing and Morris Scharff" (R. 149). It is respectfully submitted that there is no evidence in the record upon which a finding of discrimination may be made as to Pauline McGhee.

LAYOFF OF VIOLET EWING.

Violet Ewing made welts. She was terminated on January 31, as a part of the cutback in production. Violet Ewing and Margaret Britt did similar but not identical work. In addition to their other work they shared the sewing of facings, a mechanical operation. The job which Margaret Britt performed was more complicated than the one performed by Violet Ewing. The decision was there made to retain Margaret Britt and have her do Violet Ewing's work along with her own rather than the reverse (R. 310-311, 426-427, 466, 689, 637, 653-654).

The Trial Examiner's analysis of Violet Ewing's layoff consists of a listing of several things which Respondent did not do. For example, Respondent *did not* reprimand Ewing for her unsatisfactory work. (This was not a discharge for cause but a layoff.) Respondent *did not* compare Ewing with an employee named Madeline or explain why the two were not compared—although there is nothing in the Record to indicate why they should be compared. There is no showing that Madeline was ever assigned to the job performed by Ewing. The Trial Examiner just assumed that there should be such a comparison.

Respondent did recall Ewing in October of 1958, and Prosterman is reported to have stated to Supervisor Higgins that she was a good worker. *Again* she was not discharged for cause but laid off in preference to another employee.) The only other factor alluded to by the Examiner was seniority which again becomes important because it favors the alleged discriminatee. Those considerations—failure to reprimand and failure to compare with an employee, whose full name is not even known, plus commendatory remarks upon reinstatement, and of course seniority—are the basis for the Examiner's refusal to accept Respondent's explana-

tion for Violet Ewing's layoff. It is respectfully submitted that there is absolutely no validity to the Examiner's analysis and that each and every premise upon which it is based is false and meaningless.

The Trial Examiner stated his general conclusions regarding the layoffs (R. 151-154). An examination of these conclusions reveals that they are nothing more than a reiteration of his other findings. In effect he says that since he found other violations of the Act based upon other testimony (most of which is discussed at other places herein), he therefore finds the layoffs to be violations. It is extremely difficult to follow this logic. The Record as a whole does not support it. It is significant therefore that the Examiner found it necessary to turn to Mr. Uspensky's work on mathematical probability in order to support his conclusions. The Board tried to help him by throwing in a few more findings of violations of Section 8(a)(1). But when it all boils down, the glaring defect in their case is that they decided it upon *mathematical probability, whim, suspicion, conjecture, false assumption and pure and simple guesswork.*

DISCHARGE OF LUCILLE YANCEY.

The case of Mrs. Lucille Yancey presents a perfect example of the Trial Examiner's predisposition to credit the Petitioner's witnesses while summarily dismissing Respondents' evidence.

Mrs. Yancey was discharged by Respondents on or about December 4, 1957. The reasons for the discharge were that Mrs. Yancey's work was poor, her attitude was generally bad and she was uncooperative. In spite of warnings about her sloppy work, make-up increased and her performance became increasingly poorer the longer

she worked for Respondents, culminating in six straight weeks of make-up pay (G. C. Ex. 29, R. 478).

Respondents produced six witnesses who verified that Yancey's performance justified her discharge. All were intimately familiar with Yancey's performance and represented not only supervisory staff (Scharff, Prosterman, and Higgins), but also her fellow workers (Odele Barnes, Imogene Meeks and Ruby Berry). All of these witnesses concurred in the testimony that Mrs. Yancey's work was unsatisfactory. All the supervisors who acted as overseers for Yancey are consistent in their testimony that Yancey had been terminated for good and valid reasons. All witnesses agreed that Yancey's work was poor and full of mistakes. The evidence showed that she used the wrong color thread (R. 85), that she sewed the wrong facing on the wrong lining and that the darts were sewn on the wrong side of the lining (R. 89). In short the quality of her work was shoddy (R. 85-91).

It was further shown, however, that the defective work and production were not the only place where Yancey proved to be a poor employee. The evidence also indicated that in addition to being "incompetent", "undesirable" and "unsatisfactory", she also "grumbled", "complained" and was generally uncooperative and unruly (R. 87-88). Besides complaining about the cut of the coat which she admittedly had difficulty sewing (R. 91), she is quoted to have said off-handedly to her supervisor, "Now, listen you are going to have to make it a little easier on us around here". (R. 188).

The Record further shows that Lucille Yancey signed a union authorization card (R. 327), but took no active part in organizing fellow employees (R. 525-526). This witness admits that no supervisor mentioned or discussed

the Union with her (R. 525). It is further clear that Lucille Yancey was discharged on December 4, 1957 (R. 328, 434-435), before a single Union meeting had occurred (R. 525). The evidence reveals that Lucille Yancey was discharged for cause (R. 615-621, 630-631, 640, 665). Even after her discharge this witness admits that the Respondents did not know of her union activity (R. 332).

Yet the Trial Examiner in the Intermediate Report states:

> "I am satisfied that Mrs. Yancey was discharged on December 4, 1957, because of her activity on behalf of the Union." (R. 98).

It is submitted that this employee had no Union activity other than signing a card, that there is absolutely not one iota of Company knowledge of any such activity on the part of this employee, direct indirect, imputed or otherwise. Scharff's testimony verifies this statement (R. 685).

Based on the facts of the Record, it is submitted that the General Counsel has not carried the burden of proof and that the findings of the Trial Examiner with respect to this alleged 8(a)(3) violation are completely erroneous and unjustified by the Record.

Two further points illustrate the fact that the Employer was understandably exasperated and completely non-plussed by the Trial Examiner's report and the Board's decision and that Mrs. Yancey's testimony on its face indicated that she was not a credible witness. First, is the fact that Yancey (whose testimony was fully credited while Meek's testimony was partly credited and partly discredited) (R. 90, n. 26; R. 94) testified that during the entire five months she had worked for Respondent she had *never* been given any instruction on how to do her work (R. 91). This statement is unbelievable. She had worked

for over five months, had been admonished every day and had made Higgins weep, but she had *never* been instructed in her job! Further, she denied arguments with Higgins and other employees and said all her discussions were "routine"—(routine discussions but no instructions)—and all her discussions with Higgins were on a friendly basis. Respondents suggest that Mrs. Yancey's term "discussions", which she admits having, is a euphemism for reprimands and instruction. In addition to Yancey's claim that she was never instructed in how to do her job, a statement made in the face of the admission that she had never sewn lining before, is the assertion that she never ripped out a single lining (R. 523). This in and of itself would lead one to doubt her veracity in view of the testimony of five other witnesses. This doubt is confirmed without question a moment later, however, when she says she did not rip out linings and that she sewed a completely "proper garment." (R. 524).

The other points regarding the tendency of the Trial Examiner to prejudge an employee and to arbitrarily give credit to one witness' testimony over the other without any reason is best illustrated by quoting one sentence from his opinion.

> "The only testimony regarding Yancey's alleged failure to distribute fullness properly was that of Prosterman and Higgins, whom I generally discredit and moreover, even if it occurred which I doubt, I am not persuaded that it was due to any lack of ability on the part of Mrs. Yancey but rather to the *skimpy* cut of the lining which she admittedly and frequently called to the attention of her supervisor." (Emphasis supplied) (R. 95).

Certainly we have administrative expertise here, the Trial Examiner, unknown to anybody in the hearing, claims to

know how to manufacture clothing. Yet he never examined the goods, never mentioned that he knew anything about the clothing business and never held Yancey up as an expert. This conclusion is unjustifiable.

These facts together with the clear indication that the Trial Examiner's predisposition in this matter supports the Employer's contention that his finding regarding the creditability of witnesses are not supported by the evidence and all ill-founded.

Petitioner, in its Brief, and the Trial Examiner, in his opinion, expound the virtues of Mrs. Yancey by showing that Mrs. Yancey had some past experience and that she had never been criticized for her work. Respondents' position on all such assertions by the General Counsel and on all the employees alleged to have been discriminated against, is that the experience asserted in favor of many of these people means nothing for the following reasons. First, some experience can be worthless or actually detrimental, especially in this type of operation since the product was a finished, quality men's coat. The sloppy and hurried methods used in the manufacture of cotton pants would hardly be transferable to those required in this plant where less workable cloths are used. Mrs. Yancey's experience was in a work clothes' plant at "Carwood". The Trial Examiner made no distinction between these two type operations.

Items such as make-up pay, work to be redone and Respondents' push for more production were a substitute for outright criticism. It would be hard to believe that they did not know when they were doing a substandard job. Besides this fact, another point which Petitioner attempts to make is the fact that Supervisors Prosterman and Morris Scharff's reasons for layoff were not consist-

ent. Prosterman said that there was not enough work for her (R. 84, 329), while Scharff told her that her work was "unsatisfactory" (R. 84, 330). The Employer asserts that in the existing situation where a cutback was concededly necessary that Petitioner is attempting to force a distinction here where there is none. Both witnesses were saying in effect that Mrs. Yancey's work was substandard and under present conditions she could not be retained. The problem was that Prosterman was given the job of firing her and he tried to do this as diplomatically as possible. Insofar as Lucille Yancey's statements regarding her *belief* that she had been terminated because of her Union membership, we point out to the Court that they were specifically denied by Morris Scharff (R. 86). In such a case the direct evidence should certainly prevail over the self-serving declaration of an interested party. The Trial Examiner credited the conjecture without apology. Noteworthy, also, is the fact that contrary to General Counsel's statement that the records did not show poor work or that the production was unsatisfactory, the payroll records (G. C. Ex. 29, R. 478) prove that Mrs. Yancey had six weeks of straight time (when she was not on a piece rate), eight weeks in which she made production and eight weeks in which she did not make production. Six of these weeks in which she failed to make production occurred just before she was terminated. At this time she had had six months training in Respondents' plant in addition to her other six years vast experience with Carwood. Later, when Yancey had a change of heart, Petitioner admitted the fact that Morris Scharff refused her offer to defect and become a turncoat against the Union (R. 685). Scharff was presented with a real opportunity here to do irreparable harm to the Union's organizational drive. It is to Scharff's credit, however, that he decided to forego this opportunity which

would have been irresistible to a person dedicated to anti-unionism and very tempting to the average employer.

The incongruity and hollow ring of this case arises in the presumption indulged in by the Trial Examiner that all the Employer's acts were a mere pretext for his vengeance against the Union.

If the evidence of this case is fairly read, the General Counsel has not made out his case. There is no evidence that the Employer knew of Yancey's Union leanings (R. 525-526, 685). She was not a member of the Union when she was fired. A short time after Prosterman became head of this operation she was discharged—there was no delay. The Company acted decisively when they felt justified in making a definitive judgment on this employee.

DISCHARGE OF GRACE McCART.

In the case of Grace McCart, who was discharged on January 10, 1958, the Court is again provided with direct and disinterested testimony to overcome the false assumptions, implications and innuendos which are relied on by General Counsel and the Trial Examiner in this case. The Employer submits that the testimony of Mr. Scharff, Mr. Prosterman and Mrs. Ewing, supervisors, and Sara Sanders and Charlotte Towler (disinterested employees of the Company) will dispel any doubt as to the incompetency of Grace McCart. McCart was discharged because of bad work (R. 508-510, 591, 599-603, 679-680, 694). She was admonished about the substandard quality of her work on numerous occasions (R. 591). In addition to McCart's difficulty with the thread, colors, machine and declining production, McCart also had difficulty with her supervisor, Myrtle Ewing, "on many occasions". (R. 98-100, 529). The aggregation of these "difficulties" led to McCart's discharge.

The Trial Examiner throughout the hearing required a high degree of explicitness of all Respondents' witnesses. He completely discounted, for instance, the testimony of two of Respondents' inspectors, who said that they found places where the thread skipped on collars and coats sewn by Mrs. McCart, because it was too vague. Yet, the Trial Examiner blandly offers the production records of October 11, 1958 (R. 101), a year *after* McCart's discharge and subsequent pre-employment, as definitive evidence that Prosterman's testimony regarding her poor production was inconsistent. Whatever production rate McCart may have been able to achieve more than a year *after* her discharge and after she started to work again, is not relevant evidence to the period in question, *viz.*, around October, 1957.

On another occasion General Counsel tried to establish the point that the reasons for McCart's discharge were (1) the malfunction of her sewing machine (which happened to be new), and (2) McCart's union activities. If we are allowed the same presumption as the Trial Examiner indulged in, the Employer respectfully submits that no self-respecting businessman, Scharff included, who wanted to stay in business, would permit the malfunction of a small item such as a sewing machine to eliminate the effectiveness of an employee's work. Her wages would more than pay for a new machine in a very short time. The testimony shows and the Trial Examiner admitted (R. 98) that the machine was new and that the plant mechanic repeatedly fixed the machine and was continually checking it. It seems reasonable then to assert that the real reason for McCart's failure to make production was not the machine but her own inability or lack of desire to master the operation. *McCart alleged the machine wouldn't do as good work on gabardine material as on*

other materials (R. 350-351, 529). *General Counsel's witnesses, Hester McCart and Mary Alice McWaters, however, testified gabardine did not give any more trouble than any other material and that the "Lewis Blind Stitching Machine" worked satisfactorily* (R. 377). This leaves but one conclusion; any failure of the machine to operate properly was the fault of the operator. McCart also testified that she had another machine at her disposal if her machine happened to malfunction. The Trial Examiner blithely overlooked this fact when he attributed so many of McCart's shortcomings to the equipment with which she worked (R. 102).

Insofar as McCart's union activity is concerned, Morris Scharff testified that at the time Grace McCart was discharged he did not know whether she belonged to a union or not (R. 680, 700). This testimony is again indicative of the fact that the reason for McCart's discharge was not her union activity but her continual incompetency as an operator. The Record reveals this employee had make-up pay, was poor as a sewer (R. 407), produced bad work (R. 351-353, 407, 411, 595, 599-601) and was corrected regularly about her work (R. 591). She was discharged on January 9 or 10, 1958, by both her supervisors and told that her work was unsatisfactory for so long that they had to let her go (R. 351). The only reason she had not been discharged before, according to the supervisor, was that Supervisor Prosterman had no one else available in the factory to use the Lewis machine (R. 657).

Mrs. McCart, in her testimony related a conversation which she had with Morris Scharff *after* her discharge. General Counsel, in making much of this conversation, does not emphasize or even mention the fact that Morris Scharff, when presented with her accusation that she was fired because of union activities, denied this fact and promptly

explained to her that the real reason for her discharge was her unsatisfactory work. Neither is the fact mentioned that it was McCart, not Scharff, who first introduced the subject of union into the conversation. Upon her making the inquiry, Scharff, who was evidently surprised by this accusation since he knew nothing of her union activity, then felt free to discuss the matter with this discharged employee.

It is important that Counsel for the General Counsel never established that this employee had signed for the Union or engaged in any Union activity. Thus, the Trial Examiner has, upon the basis of a conversation occurring *after* her discharge between the alleged discriminatee and Morris Scharff, found that the Respondents discriminated in respect to the hire and tenure of employment of Grace McCart (R. 102).

Except for this conversation with Scharff, Mrs. McCart admits in her testimony that she had never been interrogated regarding her Union activity by any member of management in the plant (R. 530).

The *facts* as shown by the testimony indicate that Mrs. McCart was an incompetent employee. The testimony of numerous witnesses verifies this fact. She had trouble with Myrtle Ewing and the machine, in spite of the fact that the machine was brand new and she had another one available (R. 530). After her discharge she had a conversation with Morris Scharff in which she interjected the subject of Union into the conversation, and after Scharff denied he had discharged her because of her Union activity, a short discussion on unions resulted in the natural course of events. Respondents respectfully aver that the paucity of evidence is insufficient to sustain the Board's finding of discriminatory discharge.

DISCHARGE OF PEARL COKER.

Mrs. Pearl Coker was discharged because she could not produce a sufficient quantity of work and because her operation was absorbed by three other employees, Mary Lou Partain, Hester McCart and later Louise Sammons. Mary Lou Partain, a Union advocate whose name appeared on the Union letter as a member of the organizing committee, was retained over Mrs. Coker.

These circumstances prove that Respondents' predicament was a hopeless one. Unless Respondents laid off Hester McCart, a concededly superior worker, they were placed in the unhappy situation of choosing between two Union employees for the layoff. As later developments proved, there was no possible way to win in such a situation—allegations of discrimination waited for them either way they turned. Higgins testified that the section was too "strong"—meaning they had too many employees on this operation. Thus, one operator had to be laid off. Since there had to be a layoff, Pearl Coker was chosen because she was a slow operator and she apparently could not make production (R. 416-417, 622). Neither could she set a collar properly nor adjust its fullness correctly. Frequently, Coker's work had to be redone (R. 622). Although Partain's work left much to be desired and she was admittedly slow in this operation, it was decided that because of her ability to perform additional operations in the section she would be retained. Coker made no pretense of being versatile and at that particular time a versatile operator was needed until Louise Sammons could return to work (R. 696-697). But here was no need for two operators—one versatile and one not. Partain was then soon moved to utility girl where she properly belonged. Thus Partain was Pearl Coker's temporary replacement until Sammons could come back for the Spring

season from a leave of absence (R. 563). Partain was kept on in order to maintain some degree of flexibility in the operation.

Pearl Coker was rehired some eight months later to fill in a gap in production. The reasons for the rehiring were that Mary Lou Partain had quit in the interim (R. 624) and Mrs. Coker would not need retraining. Further, the quantity of garments needed was higher than it was in January, 1958. Coker, it was judged, could supply just about the amount of production needed to balance the section's production with the rest of the shop. A faster operator would have produced too many collars and created an imbalance. This explains the hiatus period to which the Trial Examiner referred. (R. 106).

Contrary to the General Counsel's glowing opinion of Mrs. Coker and the statement that her work was never criticized, Mrs. Coker's testimony admits that she continually had make-up pay, even up to the time she was fired on January 15, 1958 (R. 526-527).

Pearl Coker testified on cross-examination that she did not actively work for the Union and never even attempted to sign up anyone for the Union. General Counsel points to the fact that on January 10, 1958, Pearl Coker told her supervisor, Grace Higgins, that she had attended a Union meeting the previous evening and that shortly after making this statement she was discharged. This fact alone was apparently enough for the Trial Examiner to find that there had been a discriminatory discharge. In order to justify his position, the Trial Examiner referred to a conversation which was supposed to have taken place between Mrs. Higgins and Mrs. Coker in which Higgins was alleged to have said that Morris Scharff had informed them in a supervisors' meeting that he would

close down the plant before they would allow union labor in the plant. What was not referred to in connection with this conversation, however, was the fact that there was at least one other employee present at this conversation. Not only was she not mentioned, but she was not called upon to corroborate this hearsay testimony. Hester McCart was present and overheard the entire conversation (R. 106).

Strangely enough, however, McCart did not hear Higgins give the account of the supervisors' meeting (R. 106). Higgins likewise did not remember giving the account of the supervisors' meeting where this statement was alleged to have been made (R. 627). It would be difficult to believe that such a statement was made in view of the other circumstances in the case. Certainly, if it had been made Hester McCart, another employee who was present, would have heard it, and certainly would have been much more impressed with that than with the original remark by Pearl Coker about attending a Union meeting. Presumably, this testimony was offered for two purposes, one, to get in the alleged threat by Grace Higgins and the other to prove that the Company knew Pearl Coker had been to a Union meeting about the time she was fired. This was January 15, six weeks or so after the Union campaign had started. It does not seem logical that the Company would at this time fire an employee who had simply attended a Union meeting and who came to her supervisor and advised her of the fact. She did not say that she had joined the Union or believed in the Union, she simply stated that she had been to a meeting, and that is the Board's case with regard to Pearl Coker. The facts show that Pearl Coker was discharged for reasons entirely apart from her attendance at a Union meeting. In the first place, Pearl Coker was unable to pro-

duce the quantity that was needed on her job. A comparison between her production (G. C. Ex. 37) and that of Hester McCart (G. C. Ex. 38) illustrates this point better than words. The same point is illustrated in comparing Coker's record with that of Louise Sammons (Resp. Ex. 43). The Record is unquestioned that more production was required from the particular job that Pearl Coker was doing. Another operator who had previously been employed and was known to the management to be competent and more efficient than Mrs. Coker was available. Three operators were not needed on the job if you had two good ones. Hester McCart and Louise Sammons were both better operators than Pearl Coker, and for that reason, and that reason alone, Pearl Coker was discharged and Louise Sammons was put in her place. Mr. Prosterman summed up the circumstances surrounding Pearl Coker's discharge in the following words: "I had two operators available who were capable of turning out production and earning a great deal more and I thought Pearl Coker was surplus." (R. 309). This is also supported by the uncontested evidence (R. 415-417, 465-466, 622-624, 687).

Based on the facts presented in the Record, Respondents submit that a thorough reading of this testimony, stripped of any facts supplied from outside the Record, will yield no other conclusion except that this employee was justifiably discharged.

DISCHARGE OF RUTH BROOKS.

Ruth Brooks was discharged from the pants plant on January 16, 1958, by Mr. Hughley (R. 109). Mrs. Brooks admitted that she did not make production and that she had difficulty doing the work. The conceded facts are that layoff was necessary and that the work force was to

be severely cut from approximately thirty-eight operators to twenty-two operators (R. 102, 113). Any vague accusation as to discrimination in the discharge pales under the weight of this evidence. There can be no dispute, contrary to the Trial Examiner's assertion (R. 111, n. 40) that there was not a reduction in the work force, since in three months time the employee complement dropped from forty-three to twenty-six employees and ultimately to nineteen (Resp. Ex. 7).

The true facts concerning this employee furnishes another example of why the alleged virtues of this employee are not founded upon real evidence. The finding by the Trial Examiner that Ruth Brooks had had a great deal of qualifying experience, had *never* been criticized in her job and was a "good" operator is a gross misstatement of fact. Specifically, the uncontradicted evidence shows that (1) in spite of Ruth Brooks' experience she was a poor employee and by her own admission had an abnormal amount of make-up (R. 560); (2) she was fully apprised of her inadequate performance, was distressed about it, and had been criticized directly and forcefully. The following specific testimony illustrates these facts: (R. 560, 561)

> "Q. Did you have difficulty doing the work that you were doing down there?
>
> A. At times.
>
> * * *
>
> A. I told her about the different places that I had worked before and that I had always made production everywhere I worked until I came there. And there was something wrong somewhere why I couldn't make it.
>
> * * *
>
> A. I went in to see him one morning and he was back there at my machine and we talked about my operation

and I told him that I wasn't satisfied with it. And he said, 'Frankly, I'm not either.'

Q. Now when you were told to go up to the other plant and report—you remember testifying to that?

A. Yes.

Q. Why didn't you go up there the next day?

A. Because I was with Lucille Yancey the morning that she asked Arthur Scharff about any of the employees being transferred to the pants department. And he said that no one would be transferred whatsoever. And after I had talked with him about—he told me that I either—I talked to Morris, and he told me that I either had to get my production or else * * *."

The reasons offered by Respondent for Ruth Brooks' discharge were that she did not produce enough. Contrary to the Petitioner's assertion, that her production record matched that of other employees, the above excerpts from the testimony clearly indicate that her work was, in fact, below par. Indicative of the fact that the Trial Examiner's assertion that this employee was beyond reproach actually misconstrues the testimony is revealed by the incident in the Record which establishes that this employee was at one time close to committing an act of insubordination. Ruth Brooks testified that she was instructed by her Employer to report to the pants plant for work the next morning. She admits that on that occasion she turned and walked off without making any reply and did not report to work the next morning as directed. Certainly, if the Employer were looking for an occasion or a reason to discharge an employee he was provided with a golden opportunity at this point. The fact is, however, that he wished to give Ruth Brooks a chance to prove herself and make production in the pants plant, the facet of his operation which required less skill.

Further justification for the discharge of this employee, if further justification is necessary, are the facts that the personnel of the pants plant fluctuated from forty-eight employees to nineteen employees, over a three to four month period, and that both of Respondents' operations were in the process of being moved into one building. Under such circumstances it is not strange that an employee whose profile as a worker is graphically depicted above should be released. Indeed, it is strange that anyone could question the discharge or the fact that in this as in other instances the quality of mercy was strained to the limit.

II. The Law

The Court of Appeals took cognizance of and gave effect to the valid principles of law governing the scope of review of Board decisions as contained in Section 10 (e) of the Act, and the controlling decisions of this Honorable Court.

The Petitioner argues that the Court of Appeals "grossly misapplied" the law in this case. In support of that proposition it has been contended that the Fifth Circuit, in a long line of cases, has applied a standard of review in cases of this kind which goes beyond its statutory authority. An examination of the record in this case, the controlling authorities and the Court of Appeals decision reveal this argument to be wholly without merit.

The true question before this Court is whether a Court of Appeals must follow the mandate of Section 10 (e) of the Act and consider the Record *as a whole* (which this Court has frequently said that it must do) or whether it shall be confined to such evidence in the Record as may be favorable to the Board's decision without taking into account whatever in the Record fairly detracts from its weight. The Board's evidence in this case was an extremely meager amount of proof, to say the most for it

The inferences and conclusions which were drawn from that bare minimum of evidence both in the decisions of the Trial Examiner and the Board far exceed the facts. When this evidence is viewed in the light of the overwhelming evidence to the contrary, it simply does not support the decision.

A reading of the opinion of the Court below clearly shows that the Court of Appeals was appalled at the complete lack of proof on the part of the Board. The basis of the refusal to enforce was not the substituting of fairly conflicting inferences but the realization that the Board had drawn unfair, illogical inferences. The inferences and conclusions of the Board were not based upon facts.

In effect, the Petitioner is contending that if there is any proof whatsoever to support the Board's decision, however meager, then the Court of Appeals must enforce. This has not been the law for a number of years, and it was not the intention of Congress that it be the law.

The National Labor Relations Act, as amended, *supra*, provides in Section 10 (e):

> "The findings of the Board with respect to questions of fact if supported by substantial evidence on the Record *considered as a whole* shall be conclusive." (Emphasis supplied).

Prior to the enactment of the Taft-Hartley Act the scope of review of Board orders tended toward a consideration of evidence viewed in isolation. As this Court said in *Universal Camera Corporation* v. *NLRB*, 340 U.S. 474, 478:

> "It is fair to say that by imperceptible steps regard for the fact-finding function of the Board led to the assumption that the requirements of the Wagner Act were met when the reviewing court could find in

> the Record evidence which, when viewed in isolation substantiated the Board's findings."

It was under this view of the Wagner Act requirements prior to Taft-Hartley, that the decision in *National Labor Relations Board* v. *Waterman Steamship Corp.*, 309 U.S. 206, to which the Petitioner adverts (P. p. 30); was reached. The case of *National Labor Relations Board* v. *Nevada Consolidated Copper Corp.*, 316 U.S. 105, upon which the Petitioner relies so heavily, was also prior to the Taft-Hartley amendment which expressly enlarged the scope of review by requiring a consideration of the Record as a whole. This Court in *Universal Camera* recognized that Congress intended to modify *Nevada Consolidated*:

> "This phraseology was adopted by the Senate. The House conferees agreed. They reported to the House: 'It is believed that the provisions of the conference agreement relating to the courts' reviewing power will be adequate to preclude such decisions as those in *NLRB* v. *Nevada Consol. Copper Corp.*, 316 U.S. 105, 62 S. Ct. 960, 86 L. Ed. 1305, and in the *Wilson*, *Columbia Products*, *Union Pacific Stages*, *Hearst*, *Republic Aviation*, and *Le Tourneau*, etc., cases, *supra*, without unduly burdening the courts.' The Senate version became the law." (pp. 485-486).

Furthermore, in *Universal Camera*, this Court stated:

> "From the legislative story we have summarized, two concrete conclusions do emerge. One is the identity of aim of the Administrative Procedure Act and the Taft-Hartley Act regarding the proof with which the Labor Board must support a decision. The other is that now Congress has left no room for doubt as to the kind of scrutiny which a court of appeals must give the Record before the Board to satisfy itself that the Board's order rests on adequate proof.

"It would be mischievous word-playing to find that the scope of review under the Taft-Hartley Act is any different from that under the Administrative Procedure Act. * * *

"Whether or not it was ever permissible for courts to determine the substantiality of evidence supporting a Labor Board decision merely on the basis of evidence which in and of itself justified it, without taking into account contradictory evidence or evidence from which conflicting inferences could be drawn, the new legislation definitely precludes such a theory of review and bars its practice. The substantiality of evidence must take into account whatever in the record fairly detracts from its weight. * * * (pp. 487-488).

"We conclude, therefore, that the Administrative Procedure Act and the Taft-Hartley Act direct that courts must now assume more responsibility for the reasonableness and fairness of Labor Board decisions than some courts have shown in the past. Reviewing courts must be influenced by a feeling that they are not to abdicate the conventional judicial function. Congress has imposed on them responsibility for assuring that the Board keeps within reasonable grounds." (p. 490)

The decision of the Court of Appeals in this case is in complete harmony with the principles enunciated in *Universal Camera*. The argument of Petitioner in this case is in direct conflict with those principles. See also: *Cross Company* v. *N.L.R.B.*, 286 F.2d 799 (C.A. 6, 1961).

The very thing about which the Petitioner truly complains is likewise the very thing which this Court has said the Courts of Appeals are required by law to do—review the record *as a whole*—"take into account whatever in the Record fairly detracts from its weight".

Contrary to the Petitioner's argument, the Fifth Circuit has long recognized its duty and its limitaton in reviewing

Labor Board orders. See, for example, *N.L.R.B.* v. *Poultry Enterprises, Inc.*, 207 F.2d 522 (C.A. 5, 1953). The Court of Appeals in this very case specifically enumerated these duties and limitations. The Court of Appeals said:

> "The resolving of evidentiary conflicts is within the province of the Board." (R. 724).
>
> "We are aware of the requirement that we are not to overturn the Board's findings if supported by substantial evidence in the record as a whole. We recognize the principle that the substantial evidence rule applies to the choice of inferences as well as to the finding of facts as facts. *NLRB* v. *Birmingham Publishing Co.*, 5th Cir. 1958, 262 F.2d 2. We do not question the settled doctrine that the Court should not, as a general proposition, disturb the action of the Examiner and the Board in crediting or discrediting the testimony of a witness. *NLRB* v. *West Point Manufacturing Co.*, 5th Cir. 1957, 245 F.2d 783; *NLRB* v. *Newton Co.*, 5th Cir. 1956, 236 F.2d 438." (R. 726-727).
>
> "This Court has had frequent occasion to announce and develop the doctrine that if it appears that there is substantial evidence on the record as a whole to make the inference of legal or illegal discharge reasonably equal, we may not overturn the Board's finding of an illegal discharge"
>
> *N. L. R. B.* v. *Dan River Mills, Inc.*, 5th Cir. 1960, 274 F.2d 381; *N. L. R. B.* v. *Fox Manufacturing Co.*, 5th Cir. 1956, 238 F.2d 211; *N. L. R. B.* v. *Newton Co.*, 5th Cir. 1956, 236 F.2d 438; *N. L. R. B.* v. *McGahey*, 5th Cir. 1956, 233 F.2d 406; *N. L. R. B.* v. *Coats & Clark, Inc.*, 5th Cir. 1956, 231 F.2d 567, *N. L. R. B.* v. *Houston Chronicle Publishing Co.*, 5th Cir. 1954, 211 F.2d 848 (R. 727).

It is difficult to conceive of a more forthright statement of the valid principles of law applicable to a case of this kind. Certainly it cannot be said that the Court of

Appeals was unaware of these controlling principles in reaching its decision. It is inconceivable that the Fifth Circuit, or any other Circuit, would deliberately misapply these or any other governing principles. Yet that is the Petitioner's contention in this case.

This is not a case which contains some novel point of law. This is not a situation where the Fifth Circuit is following an interpretation of the law which is in conflict with another circuit. The principles applicable to this case have long ago been enunciated by this Court and the Court below took express cognizance of them. This is a case where the Court of Appeals reviewed the Record as a whole and made a finding that the decision of the National Labor Relations Board was not based upon substantial evidence. There can be no doubt that the Court of Appeals recognized its clear responsibility in this regard:

> "As we must do in these 'substantial evidence' cases, we have undertaken the tedious task of reading the record and reviewing the evidence; tedious because of the necessity of going from the Board's appendix to the employer's appendix, and so back and forth from one to the other, in an effort to piece together the isolated excerpts of testimony which each party has extracted for the purpose of supporting the position for which it contends. The Board incorporates into its appendix nineteen separate quotations from the testimony of the witness, Morris Scharff, and the employer includes thirty-seven selections, from the testimony of this witness. The same is also true, to a lesser degree, with respect to the testimony of twenty-five or more of the other witnesses. Our decision is to be based upon the record considered as a whole. Parts of the record, taken out of context, are not to be considered piecemeal, but we are to consider the record in its entirety and as a unit. This we have attempted to do." (R. 722)

The detailed analysis of the Record clearly establishes that the Court below did study the Record as a whole and did make a fair evaluation of it. The Court of Appeals stated:

> "We have the *firm conviction* that there is not substantial evidence on the record as a whole that the discharge of Mrs. Yancey was wrongful (R. 730).
>
> "We reach the same conclusion with respect to Grace McCart, Pearl Coker and Ruth Brooks." (R. 730).
>
> * * *
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> "The Examiner, however, and the Board, rejected the reasons asserted by the Respondents and found the motive for the selection of the nine committeemen was their union membership. In so doing the Board placed its own evaluations upon the factual situations, assumed managerial prerogatives, and reached the conclusions that good business judgment would not have justified the Respondents in their selections for layoff and therefore, says the Board, the motive was the unlawful one." (R. 732)
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> "We reached the conclusion that the Board's General Counsel has failed to carry the burden of showing by substantial evidence on the record as a whole that the layoffs were discriminatory. * * *" (R. 733).

This Court has recognized that the review of the Record in Labor Board cases is the statutory function of the Courts of Appeals. In the case of *Universal Camera Corp.* v. *NLRB, supra,* this Court said at page 491:

> "Whether on the record as a whole there is substantial evidence to support agency findings is a question which Congress has placed in the keeping of the Courts of Appeals."
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> * * *
>
> "A formula for judicial review of administrative action may afford grounds for certitude but cannot as-

sure certainty of application. Some scope for judicial discretion in applying the formula can be avoided only by falsifying the actual process of judging or by using the formula as an instrument of futile casuistry. It cannot be too often repeated that judges are not automata. The ultimate reliance for the fair operation of any standard is a judiciary of high competence and character and the constant play of an informed professional critique upon its work."

Again in *NLRB* v. *Pittsburgh Steamship Co.*, 340 U.S. 498, this Court stated at page 502:

"* * * The Court painstakingly reviewed the record and unanimously concluded that the inferences on which the Board's findings were based were so overborne by evidence calling for contrary inferences that the findings of the Board could not, on the consideration of the whole record, be deemed to be supported by 'substantial' evidence.

"Were we called upon the pass on the Board's conclusions in the first instance or to make an independent review of the review by the Court of Appeals, we might well support the Board's conclusion and reject that of the court below. But Congress has charged the Court of Appeals and not this Court with the normal and primary responsibility for granting or denying enforcement of Labor Board orders."

* * *

"This is not the place to review a conflict of evidence nor to reverse a Court of Appeals because were we in its place we would find the record tilting one way rather than the other, though fair-minded judges could find it tilting either way. It is not for us to invite review by this Court of decisions turning solely on evaluation of testimony where on a conscientious consideration of the entire record a Court of Appeals under the new dispensation finds the Board's order unsubstantiated. In such situations we should 'adhere

to the usual rule of non-interference where conclusions of Circuit Courts of Appeals depend on appreciation of circumstances which admit of different interpretations.' *Federal Trade Comm'n* v. *American Tobacco Co.*, 274 U.S. 543, 544, 47 S. Ct. 663, 71 L. Ed. 1193."

The Petitioner in this case is seeking to have this Court reverse a decision of the Fifth Circuit which turned solely on an evaluation of testimony. It is clear from a reading of that decision that the Court of Appeals conscientiously and painstakingly considered the entire Record and reached the unanimous decision that the findings of the Board could not be deemed to be supported by "substantial" evidence.

A fair appraisal of the Record in this case, considered as a whole, can only lead to the conclusion that the Board's decision is completely unsupported by substantial evidence, that the General Counsel for the Board failed to carry the burden of proof and that the decision of the Board was the result of blind adherence to rigid formulae, unsupported inference, conjecture and surmise rather than judicial reasoning and a fair and impartial valuation of the evidence.

It is the Respondent's contention that the Trial Examiner could not, based on the evidence in the Record and the legitimate inferences drawn therefrom, correctly find that the Petitioner had sustained the burden of proof and that a case of discrimination had been made out.

The Trial Examiner obviously allowed outside, irrelevant matters to so prejudice his mind that he was unable to reach a fair and impartial decision in this case. The only direct evidence in the testimony as to the motive behind the discharges and layoffs was that of Morris Scharff himself and other members of the management staff. Each testified that the cutback was planned and

resulted according to schedule. Morris Scharff asserted directly in his testimony that their union activity was not the reason for these employees' termination and that he told each employee who inquired, individually, that union membership or union advocacy was not the reason for their termination. The only evidence to contradict the testimony is that of the alleged discriminatees who testified as interested parties that they *believed* that they were terminated for union reasons. Likewise, in each case Scharff's testimony was corroborated by the testimony of the supervisors and *other* disinterested employees. In each case reasons were given why these employees had been selected for termination. These reasons when combined with the undisputed fact that a layoff was necessary completely justify the Respondents' position and should be controlling. Certainly, the weight of this testimony is greater than that offered to the contrary. The Employer, proved that each termination was justifiable on sound business principles. The burden, however, is upon the General Counsel. The Court of Appeals for the Fifth Circuit ruled on this issue in *N.L.R.B.* v. *McGahey*, 233 F.2d 402 (C.A. 5-1956):

> "It is rather on General Counsel to establish by acceptable substantial evidence on the record as a whole that discharge came from the forbidden motive of interference in employee statutory rights." (Citing *N.L.R.B.* v. *Miami Coca-Cola Bottling Co.*, 5th Cir., 222 F.2d 341; *N.L.R.B.* v. *Brady Aviation Corp.*, 5th Cir., 224 F.2d 23; *N.L.R.B.* v. *Alco Feed Mills*, 5th Cir., 133 F.2d 419; *N.L.R.B.* v. *Tex-O-Kan Flour Mills*, 5th Cir., 122 F.2d 433; *N.L.R.B.* v. *Ray Smith Transport Co.*, 5th Cir., 193 F.2d 142.

General Counsel, however, in attempting to sustain this burden introduced testimony which was made up of hearsay, conclusions and sheer conjecture as to the Em-

ployer's motive. Although all the General Counsel's witnesses who were interested parties were present in the hearing room, their testimony is replete with contradictions and unfounded conclusions. Yet, the Trial Examiner saw fit to credit every one of these witnesses and to discredit every witness testifying for Respondents. The result is an opinion based on unbelievable evidence which cannot be considered as reasonable to support a conclusion. The Petitioner, on the basis of the Record, did not sustain its burden of proof sufficiently for the trier of fact to resolve the question against Respondent.

The pervasiveness of agency actions enhances the need for added assurance that the judiciary will not abdicate its functions in restraining overzealous agency action. The notions of agency expertise and their propensity for making policies and enacting doctrines cannot displace the Court's area of competency—that of weighing the evidence, drawing necessary inferences and guaranteeing that the legislative mandate and judicial decisions are applied evenhandedly. Respondents have, insofar as possible in their review of the voluminous record of the case, attempted to convey to the Court its reasons why this case emits a hollow ring. There has been in effect only one decision on the decisive issues of the case—the Board gave no more than a passing nod to the Trial Examiner's lengthy and involved opinion, which covered 106 printed pages in the Record. *N.L.R.B.* v. *Cosco Products Co.*, 280 F.2d 905 (C.A. 5, 1960).

Close investigation has borne out, however, that the approach was one of a predisposed mind. That Respondents' case had been prejudiced to some degree is amply illustrated by the Trial Examiner's failure to credit *any* of the Respondents' witnesses while at the same time asserting with dogmatic certainty that the interested witnesses of Petitioner are beyond reproach. *Farmer Co-*

Operative Co. v. *N.L.R.B.*, 208 F.2d 296 (8th Cir. 1953). Yet, there were pointed out examples of reliance on hearsay, inconsistencies, contradictions and misstatements in their testimony. *Victor Products Corp.* v. *N.L.R.B.*, 208 F.2d 834 (D.C. Cir. 1953). On the other hand, Respondents have offered specific and reasonable explanation for discrepancies which were alleged to be in Respondents' testimony, direct evidence refuting hearsay evidence and witnesses from every section and division of the plant—interested and disinterested—but all of whom except Morris Scharff were absent from the hearing during the taking of testimony. In spite of these facts and the variance in the testimony, the Trial Examiner wrote an opinion which resolved every issue of doubt against the Respondent. If the conclusions and implications are accepted, his decision sounds very convincing on first impression. A close investigation of the inferences drawn from the testimony indicates that they are not reasonable ones.

Inference 1. The Trial Examiner inferred from the testimony, particularly Morris Scharff's speech, that the Respondents were strongly anti-union. This inference may or may not be justified, but Respondents contend that anti-unionism *per se*, even expressed, is not violative of the law so long as it is not translated into an act of discrimination. *N.L.R.B.* v. *McGahey, supra.* However, the Respondents submit that the evidence does not support a clear cut conclusion on the issue of his anti-union feeling and while it may be reasonable to support either finding, a conclusion that the Employer is not anti-union to the point of allowing it to influence its business judgment is the only reasonable one to be drawn from the evidence.

The Employer in his speech is said to have intimated company animosity and made a threat to close the plant. The transcript of these speeches, however, are part of the

Record and were accepted both by the Board and the Trial Examiner as accurate. They do not verify the conclusion asserted by some of Petitioner's witnesses that they contained a threat to close the plant. Copies of these speeches did indicate, however, that Scharff was interested in his employees knowing both sides of the story. The Union organizers had called privately at the houses of his employees, had used every means of persuasion to get them to join the Union. Undoubtedly, their prime argument was that Scharff was not giving them what they deserved. They undoubtedly offered great promises. Scharff's action and only motive was to give them the other side of the story, to convey a personal experience and impression he had had and to make it clear that they would attempt always to treat their employees fairly, but would not allow other people to make his decisions and he hoped his employees would do likewise. In this speech, however, he did tell his employees and made it quite clear that their choice on the Union was theirs and theirs alone to make. The Court of Appeals recognized this in its opinion.

Further evidence offered as indicative of Respondents' anti-union attitude were the incidents which evolved around the letter which the Employer interpreted as a threat not to lay off or discharge, according to sound business judgment, but only employees other than Union employees. Respondents admit inquiry of the employees to find out if they authorized the use of the letter. Certainly, the Employer was justified in confirming the use of their names for this purpose. Nellie Wood's testimony, *supra*, amply illustrates the point that some employees had been misled and had misunderstood what they were doing when they signed the Union card. Scharff was, in effect, attempting to see that no employee's name was used for something he did not authorize. After confirmation of

these employees he made a check by those who had been asked if they so authorized their names and a dash by those whom he had not been able to contact. General Counsel and the Trial Examiner made much of these marks—the Court of Appeals was unable to see any malicious intent behind these marks, especially in view of subsequent events. Scharff then posted the letter. In posting the letter Scharff accomplished two things—(1) he helped advise all those who may have believed that the Employer could take some retaliatory action to realize that they could be protected in the free exercise of their rights, and (2) advertised the fact that he would have to be above reproach in dealing with these employees and undoubtedly sent any employee who felt somewhat insecure in his position scurrying after the same protection and preferred treatment that the employees named in the letter were getting. If interpreted fairly, the result of the alleged interrogation and posting of the letter then fail to establish the inference drawn, *i. e.*, that these acts were coercive and discriminatory in nature and showed anti-union animus.

Finally, the discharges and layoffs of these people who were on the Union organizing committee is said to have been motivated by an anti-union attitude and, therefore, is illustrative of the Employer's dislike for the Union. This pat theory is destroyed, however, by the fact that non-union employees were laid off and discharged also.

Further, some of the employees were discharged before the letter was received, indicating that certainly it had not triggered any new policies or that the cutback was a pretext. All those terminated were laid off or discharged either for cause or had fallen victim to the Employer's selective process in reaching a permanent work force. The evidence supports these inferences.

The Petitioner argues that the Record does not show that the Union was aware that a layoff was forthcoming when it dispatched its letter to Respondents. An inference of such knowledge would certainly be more reasonable than many of those drawn by the Trial Examiner. It seems clear that the purpose of the letter was to obtain preferred treatment for those employees who had signed up with the Union in the face of a mass cutback in the work force. The Trial Examiner and the Board concluded that *none* of the Union adherents should have been laid off. This conclusion was reached in spite of the fact that it was admitted that such a layoff was necessary for economic reasons. If these findings are enforced, then the purpose of the Act will have been distorted to mean that all Union advocates must be given preferential treatment over non-union employees with regard to employment status. While the Board merely ruled that these particular employees should not have been laid off, implicit in this ruling is the proposition that the other employees with whom they were compared should have been laid off since it is unquestioned that a layoff was necessary. This cannot be anything but a complicated business judgment, for which Respondents' officials were far more qualified than the Trial Examiner or the Board. But even aside from this, a retention of the employees who were laid off in preference to those who were retained would have produced a result so highly discriminatory in practically every instance as to be patently obvious to even the most naive mind. To be sure, in a situation such as this (assuming them to be union members) the Board would have found discrimination, and perhaps with good cause.

Inference 2. The second inference indulged in was that all of the Respondents' witnesses were not worthy of belief. Respondents contend this inference is not reasonable for

the reasons stated above, *i. e.*, that they represented all parts of the plant, were not present in the hearing room, were not interested parties and that their corroborated testimony—not based on sheer hearsay—was equally, if not more worthy of belief than Petitioners. The discrepancies and inconsistencies of Petitioner's witnesses' testimony have been pointed out above. A fair reading of the testimony indicates that they were not telling the truth.

Inference 3. The Trial Examiner's third major inference is a very important one and should foreclose argument on most of the issues involved because it is unsound and completely unjustified.

The Trial Examiner inferred that the Respondents were consumed by their anti-union motives (thereby imposing inference on inference) and would subvert all business judgment to their one impliedly avowed purpose—to "crush the Union."

The Respondents have shown by clear and convincing evidence that they went through a painfully slow and studied attempt to size-up each employee for the layoff and that each layoff or discharge was a result of this scrutiny. Sound reasons were offered for every employee laid off or discharged.

The General Counsel offered no evidence to the contrary. The Trial Examiner and the Board decided that Respondents were wholly consumed with anti-union feelings and therefore refused to believe the detailed explanation of the factors which controlled each individual case. In doing so, the Trial Examiner and the Board substituted their judgment for the judgment of highly qualified management in matters of business discretion. The fact that the Board came up with a wholesale decision against Respondent in each case illustrates its complete inability to

properly weigh the multiplicity of factors which necessarily come into play in the business process of making such determinations. The Trial Examiner's obsession with formulae and his blindness to the varying circumstances of each individual layoff decision, undoubtedly occasioned by his lack of experience in arriving at complicated management decisions in this, or any industry, is the underlying, fatal weakness in the Petitioner's case. The Board's decision runs directly counter to the basic principle stated by the Fifth Circuit Court in the case of *N.L.R.B.* v. *McGahey, supra*:

> "The Board's error is the frequent one in which the existence of the reasons stated by the employer as the basis for the discharge is evaluated in terms of its reasonableness. * * * But as we have so often said: management is for management. Neither Board nor Court can second-guess it or give it gentle guidance by over-the-shoulder supervision. Management can discharge for good cause, or bad cause, or no cause at all. It has, as the master of its own business affairs, complete freedom with but one specific, definite qualification: it may not discharge when the real motivating purpose is to do that which Section 8(a)(3) forbids. *N.L.R.B.* v. *Nabors, supra; N.L.R.B.* v. *National Paper Co., supra; N.L.R.B.* v. *Blue Bell, Inc., supra, N.L.R.B.* v. *C. & J. Camp, Inc., supra.* * * *"

CONCLUSION

Respondents submit that the decision of the Court of Appeals in refusing to enforce in part the order of the National Labor Relations Board was a correct exercise of the statutory review powers of that Court. The Board's decision is not supported by substantial evidence in the

Record, considered as a whole. The unanimous decision of the Court below should be affirmed.

Respectfully submitted,

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